APPENDIX A — EXCERPTS FROM TRANSCRIPT OF ORAL ARGUMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED DECEMBER 3, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-7241

LIBERTY MUTUAL INSURANCE COMPANY, et al.

Appellant,

v.

LUMBERMENS MUTUAL CASUALTY COMPANY,

Appellees.

Thursday, December 3, 1998
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice,

BEFORE: Circuit Judges Silberman, Ginsburg and Sentelle

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THE COURT: Counsel, you put in a barrage of issues in this case.

MR. LOPATA: Yes, Your Honor. Because there are numerous errors.

THE COURT: And my suggestion for oral argument is could you focus on what you think your strongest arguments are.

MR. LOPATA: My strongest argument, Your Honor, is the fact that the negotiating parties that Mr. Art Erickson and Mr. Sam Asquith, who were the only negotiating parties to the contract, all agreed and intended that the completed operations coverage would be limited to three years after the work had been accepted by WMATA. In the April '90 —

THE COURT: And you're giving a factual point. What is your legal argument?

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[8] MR. LOPATA: No, were talking about the intent of the parties when they were negotiating —

THE COURT: I know, but wasn't it sort of late, this sort of intent was sort of developed very late in the process, after discovery.

MR. LOPATA: Your Honor, you're referring to the letters that were sent out by WMATA. WMA —

THE COURT: No. I'm referring to the material that you wanted to get before the Court. The Court wouldn't allow you to bring in.

MR. LOPATA: We wanted to get that from, oh, we wanted to get that from the witnesses and the Court refused to allow me to bring out any evidence concerning what they intended —

THE COURT: Which was a shift. It was inconsistent with what they had said earlier. Right?

MR. LOPATA: I believe so, Your Honor.

THE COURT: Yeah. You think the District Judge abused her discretion for refusing to allow you to do that?

MR. LOPATA: Yes. We asked for an amendment of the pre-trial statement. We gave the parties notice. We gave them at least three week's notice. We indicated that they would be available to have the depositions of the witnesses who were recalling facts and discussions that occurred more than two decades before. And they were able to recall at least a month before trial, as to what the intent was for having the [9] accepted contract in the language. And we moved to amend our pre-trial statement so we could assert that defense. And she abused her discretion by not allowing us to have our witnesses to testify.

With regard —

THE COURT: If you're wrong about that, what's left of your case?

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THE COURT: All you're really challenging on the jury issue though, is where the burden was placed. The interpretation of that clause does in fact govern whether there was insurance on the date of the occurrence or not. Doesn't it?

MR. LOPATA: No, Your Honor. Because —

THE COURT: It doesn't?

MR. LOPATA: No, because the answer to that, Your Honor, if in fact, there was no mutual understanding as to the [13] language that was used in the policy still raises a question that that language is ambiguous, and if the language is ambiguous and is subject to various interpretations, then it's a question of fact for the jury to decide, not as Judge Robinson did.

THE COURT: The question of fact for them to decide, though, is the intent of the parties as to that, at most, would be the intent of the parties, as to that clause. The question of whether or not insurance coverage then followed would be a matter of law. Wouldn't it?

MR. LOPATA: No, Your Honor. Because you would have to consider if, in fact, as was held, that the clause was

ambiguous. That doesn't automatically mean that you find coverage because as Judge Green —

THE COURT: That's why I last phrased the question, the interpretation of that clause, that is to say what extent when it's accepted, governs whether or not there was coverage on the date of the occurrence. Does it not?

MR. LOPATA: Absolutely, Your Honor. Yes, I misunderstood you. But that's a question for the jury to decide as to when the contract was accepted on the various dates it outlined.

THE COURT: The question for the jury to decide is first, if at all, would be what was meant by accepted in the contract. At most, that would be for the jury to decide. [14] Right?

MR. LOPATA: That's for the jury to decide and —

THE COURT: Once they decided that, if it was theirs to decide, once somebody decided that, then whether there was coverage or not at the occurrence follows as a matter of course. Doesn't it?

MR. LOPATA: It's another question for the jury to decide. Even if the language is still declared to be ambiguous, it still follows that the jury then has to decide when, considering all the evidence and all the intent of the parties, when the contract was accepted by WMATA. And it was a jury question rather than as a matter of law that was found. And they precluded us a jury trial.

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MR. FENNELL: They indicate that. That's appellees position generally. But when you talked about the specific language, we have the testimony of Mr. Asquith in the record where I pointed out. He drafted it and he says that language remained intact throughout any discussion. So that when you look at it, you have to go back and realize that he's the drafter of the language. When you go look at the record, in response to Lumbermens own counsel's question at trial, he said and I quote, he says "I am at a loss at this point in [20] time to explain how we put such a phrase together." He's referring to the phrase and such contract as been accepted by WMATA.

THE COURT: I thought that was a rather devastating statement.

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THE COURT: I have one small question, counsel. Although appellant's doesn't raise it. And I think it's relevant only to the attorneys fees and may not even be relevant on that given a recent move on the part of the D.C. Court of Appeals to vacate and *en banc* the issue of whether attorneys fees can be awarded in this matter.

But why, I'm a little puzzled at the argument that Maryland law should apply here rather then D.C. law. It seemed to me that what the District Judge did is conflate two questions which is the tort law dealing with the risk of the accident, with the question of which law should govern the interpretation in the insurance contract. What's a little

puzzling about that is this insurance contract is given to [21] cover construction in Maryland, D.C. and Virginia. Under your theory, you could have different interpretations of that contract in all three jurisdictions. And that didn't make —

MR. FENNELL: Your Honor, may I address, first, the point you made about the D.C. Circuit, D.C. Court of Appeals and the vacating.

THE COURT: Yeah.

MR. FENNELL: We've checked that. On October 8th, that appeal was dismissed. I believe it was settled, so that matter isn't going forward. As to D.C. law on this issue, it remains unsettled. Moving to your point on choice of law. If you look at the *Banker* decision, it basically says that in this kind of a circumstance, Section 193 the restatement second of conflicts of law should apply. Cause you're talking about a casualty insurance policy.

THE COURT: Yes. So who has the — which jurisdiction carries the greatest —

MR. FENNELL: And it talks about principle location under risk. When you're talking about a wrap around insurance policy —

THE COURT: The risk is not the risk of an injury, it's a risk of insurance. Isn't it?

MR. FENNELL: No, Your Honor. What you're talking about is the risk that you're insuring against is some sort of an injury.

[22] THE COURT: No, but I wan — what I'm talking about is it's, when we're talking about the risk here, it's not the risk of an injury taking place on the site, which would be governed by tort law. But rather the risk deals with the risk of nonpayment of insurance.

MR. FENNELL: No, Your Honor, under Section 193, it would be the former. When you're looking at —

THE COURT: So under these cir — well we've had —

THE COURT: We've insured against. Which would be the injury.

THE COURT: Yes. That's it. The risk insured against.

MR. FENNELL: And here you have —

THE COURT: But that's a question of liability, not so much a question of injury. Right? Yes.

MR. FENNELL: It would be under the way that the restatement works. It would be both. You're looking at what was the risk insured against.

THE COURT: What do you do with —

THE COURT: She you applied Maryland. Right?

THE COURT: Yeah.

MR. FENNELL: She applied Maryland law, Your Honor. And we believe that was correct under Section 193.

THE COURT: What standard of review do we apply in deciding whether she was correct or incorrect?

MR. FENNELL: What standard?

[23] THE COURT: What standard of review do we apply?

MR. FENNELL: Your Honor —

THE COURT: Nobody deals with that in the briefs, I don't think.

MR. FENNELL: Your Honor, I believe that maybe *de novo* review on a choice of law decision. But as to the —

THE COURT: Would there be an underlying fact question as to where the risk insured against was greatest, so as to require a substantial evidence review on the fact question and a *de novo* review after that?

MR. FENNELL: I believe so, Your Honor. And I think that on the question of the risk, if I could address that, cause I was going to answer that as part of the other question too.

This particular policy deals with risk created by the Addison Road Metro Station construction. For example, it's in the record, Mr. Erickson's testimony. If the contractor had a problem back at his yard, construction yard that's away from the premises. This insurance deals with risk at that premises. And it's in Maryland and what you're dealing with here is a handhold, on all electrical handhold which is an

immovable object. You can look at Section 193 of the restatement —

THE COURT: So the term accepted could have three different meanings in Virginia, D.C., and Maryland?

[24] MR. FENNELL: Your Honor, theoretically, you can have a difference under Section 193. Practically, I don't think given the way Judge Green looked at the law, the fact that no one under any jurisdiction really has a uniform way of looking at the term accepted in a contract circumstance that you would run into that. But if you look at comment c I believe of Section 193 —

THE COURT: Well, wouldn't collateral estoppel limit this problem?

MR. FENNELL: Your Honor, I don't think it would. I'm trying to be forthright about it because I deal —

THE COURT: That's helpful. That's helpful.

MR. FENNELL: I deal with insurance —

THE COURT: — being forthright.

MR. FENNELL: I deal with insurance generally.

THE COURT: It's exhilarating when lawyers are forthright.

MR. FENNELL: Well, but on Section 193, if you look at comment c, in comment c, it talks about the fact that if

you had a policy that would cover buildings and you had fires in Maryland, D.C. and Virginia, Section 1993 says you would treat it as three separate policies. And so the laws of those three states would apply. So, the drafters of the restatement considered this issue and recognized it.

THE COURT: Not exactly.

[25] THE COURT: That's a fiction for avoiding the embarrassment that Judge Silberman is pointing to and it's transparently a fiction that the embarrassment is not really avoided. That yet the same contract would have three different meanings in three different jurisdictions.

MR. FENNELL: Your Honor, that's a possibility. And in fact, Your Honor, in the world insurance law, that happens. And I can give you an example in environmental matters. You can have a contract, insurance contract that applies to environmental states, sites around the country. And if the Court —

THE COURT: I mean it's one thing in California and something else in the other 49 states.

MR. FENNELL: So this is not unique. This is something that courts are struggling with.

THE COURT: But if the risk here, if the risk was the risk of liability, now of course Judge Sentelle makes an excellent point which is there's nothing in the record or evidence on this. Appellant hasn't put in evidence to the effect that most of the lines of tracker in the District of

Columbia as opposed to Virginia and Maryland. Therefore, the greatest risk is in the District of Columbia, and that's where the contract was negotiated and signed, and therefore it should be D.C. law that would cover the whole business. But if you did take the extent of the risk, and the risk was [26] co-extension with the amount of property, it would be D.C., if the D.C. was the majority of the property. Right?

MR. FENNELL: If you follow your assumption, Your Honor, it's just a matter of adding up where the majority —

THE COURT: Right. But we don't have that in the record.

MR. FENNELL: No, Your Honor. And so I'm clear in my position, our position is that, and Judge Green addressed this earlier, and I think it's in the Appendix where this argument was made. And she said, you know, if this happened on a train that was moving from Maryland to D.C., you might have had a better argument on the appellant's side. This is an immovable handhold that's at that station in Maryland and Maryland's interest would be greater with respect to any injury at that station.

THE COURT: See that's an interest in the jury and the tort law. That's not the interest in interpreting the insurance contract.

MR. FENNELL: Understood, Your Honor. But even so, if you look at Section 193, and the restatement, and you look at Section 6, you end up with a very broad weighing of interests. And you can take those interests into account.

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MR. LOPATA: Beg your pardon, Your Honor, I thought it did. One other point, Your Honor, if I may. Going to your other question about the principal risk under the insurance policy and about the lack of evidence in the record, we made a proffer to Judge Robinson that Mr. Roberti would testify to exactly the fact that the principal risk under the insurance policy was in the District of Columbia because the complex construction that occurred in D.C. as opposed to in the outlying areas because they had a tunnel. And she refused to allow us to bring out that testimony from Mr. Roberti. So there —

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